United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7522

United States Court of Appeals

FOR THE SECOND CIRCUIT

BP/5

MARGARET TOWNSEND,

Plaintiff-Appellee,

—against—

NASSAU COUNTY MEDICAL CENTER: DOCTOR DONALD H. EISENBERG, SUPERINTENDENT, NASSAU COUNTY CIVIL SERVICE COMMISSION: GABRIEL KOHN, Chairman: EDWARD S. WITANOWSKI, EDWARD A. SIMMONS, ADELE LEONARD, Executive Director of NASSAU COUNTY CIVIL SERVICE COMMISSION; NEW YORK STATE DEPARTMENT OF CIVIL SERVICE; ESRA H. POSTEN, President of the NEW YORK STATE CIVIL SERVICE COMMISSION and head of the NEW YORK STATE CIVIL SERVICE DEPARTMENT,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR NASSAU COUNTY DEFENDANTS-APPELLANTS

JAMES M. CATTERSON, JR.
County Attorney of Nassau County
Attorney for
Nassau County Defendants-Appellants
Nassau County Executive Building
Mineola, New York 11501
(516) 535-4406

NATALE C. TEDONE
Senior Deputy County Attorney

WILLIAM S. NORDEN
Deputy County Attorney
Of Counsel

TABLE OF CONTENTS

TABLE OF CASES

United States Court of Appeals

FOR THE SECOND CIRCUIT

MARGARET TOWNSEND,

Plaintiff-Appellee,

—against—

NASSAU COUNTY MEDICAL CENTER: DOCTOR DONALD H. EISENBERG, SUPERINTENDENT, NASSAU COUNTY CIVIL SERVICE COMMISSION: GABRIEL KOHN, Chairman: EDWARD S. WITANOWSKI, EDWARD A. SIMMONS, ADELE LEONARD, Executive Director of NASSAU COUNTY CIVIL SERVICE COMMISSION; NEW YORK STATE DEPARTMENT OF CIVIL SERVICE; ESRA H. POSTEN, President of the NEW YORK STATE CIVIL SERVICE COMMISSION and head of the NEW YORK STATE CIVIL SERVICE DEPARTMENT,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR NASSAU COUNTY DEFENDANTS-APPELLANTS

Preliminary Statement

Plaintiff-Appellee Margaret Townsend has commenced this action pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*), 42 U.S.C. 1981 & 42 U.S.C. 1983, alleging that the requirement of either a bachelor of science degree or certification from the American Society of Clinical Pathologists for the position of medical technologist I at the Nassau County Medical Center

constitutes a discriminatory employment practice in violation thereof.

The Court below, while it did not rule on the validity of the aforementioned qualifications as they apply to blacks generally, found that the qualifications as applied to plaintiff-appellee herein operated as a discriminatory employment practice in violation of Title VII.

Statement of Facts

On June 22, 1965, Plaintiff-Appellee Margaret Townsend (hereinafter "appellee") commenced work at the Nassau County Medical Center (hereinafter "NCMC") (A. 65).* Appellee was appointed to the position of laboratory technologist I (A. 66-67). As a result of an evaluation survey conducted by the firm of Cresap, McCormick & Paget, appellee was reclassified as a provisional medical technologist I in July 1967 (A. 68, 95). The aforementioned evaluation study, which commenced in 1965, was an undertaking to reclassify all civil service positions within Nassau County (A. 195-196, 200-201).

As a result of the Cresap, McCormick and Paget survey, the new job specifications and qualifications for the position of medical technologist I became effective in July of 1967 (A. 200). A bachelor of science degree or certification by the American Society of Clinical Pathologists (hereinafter "ASCP"), in addition to passing a competitive examination, became prerequisites for the position of medical technologist I (A. 250). Although appellee had neither a bachelor of science degree nor ASCP certifiaction, she was permitted to take the competitive examination for the position of medical technologist I which was given on

* Refers to page numbers in Joint Appendix.

December 4, 1971 (A. 80). Had appellee passed this examination, she would have been accorded permanent status as a medical technologist I, as was Mr. Allen Scimeca (A. 161-162), regardless of whether or not she possessed any formal degrees or certification (A. 168). However, appellee failed the examination, and now seeks to be reinstated as a provisional medical technologist I.

There is no doubt that appellee performs her work in the blood bank laboratory in a competent manner. She is highly regarded by the supervisor of the blood bank laboratory, Mr. Frank Applewaite, who like appellee is black (A. 131, 142). Specifically, appellee works as a phlebotomist in the blood bank laboratory (A. 138). Of the fourteen persons who work in the blood bank laboratory under the supervision of Mr. Applewaite, only three or four persons have a medical technologist title (A. 133, 144). It appears that all the persons in the blood bank laboratory, except for the supervisor and assistant supervisor, perform the same duties, regardless of title (A. 133, 151, 174).

Even though she did not pass the examination in December, 1971, appellee was permitted to continue in the position of provisional medical technologist I because the eligible list promulgated as a result of the 1971 examination did not contain a sufficient number of names to fill all vacancies (A. 292).

A second examination for medical technologist I was held in April, 1973 (A. 293). Appellee's application to take this examination was rejected by appellant Civil Service Commission (hereinafter "Commission") because she lacked the prerequisites (i.e. bachelor of science degree or ASCP certification) for the position (A. 82). Appellee was discharged on December 31, 1973 with three other

provisional medical technologists, all of whom were white (A. 34), as a result of the promulgation of a medical technologist eligible list based upon the 1973 examination (A. 293). Appellee was rehired by NCMC in March, 1974 as laboratory technician II, a lower graded classification than medical technologist I (A. 86).

The position of medical technologist I is utilized in all laboratories within NCMC, and is not limited to the blood bank laboratory (A. 148, 350). The job specification for medical technologist I, which came into being as a result of the Cresap, McCormick & Paget survey, was intended by those taking part in the survey to encompass duties in each and every laboratory within NCMC (A. 222).

Appellee brought this action pursuant to 42 U.S.C. 2000e *et seq.* by summons and complaint dated February 25, 1975 (A. 5). Appellee's motion for a preliminary injunction was denied by order dated May 9, 1975 (A. 2). By decision and order dated December 8, 1975 (A. 289-308), the Court below found that the prerequisites for the position of medical technologist I (i.e. bachelor of science degree or ASCP certification), while they do not operate to discriminate against blacks generally have operated to discriminate against appellee solely because of her race in violation of 42 U.S.C. 2000e *et seq.*

Appellants appealed to this Court from the order dated December 8, 1975 and a judgment dated February 26, 1976 (A. 331-332) of the Court below. By order dated June 21, 1976 (A. 427) this Court vacated the judgment of the Court below and remanded for further hearing in light of *Washington* v. *Davis*, —— U.S. ——, 48 L.Ed.2d 597 (1976). On remand, the Court below wholly failed to enunciate either verbally or otherwise, its reasons for confirming its original order (A. 331) and subsequent judgment (A. 433-440). A judgment was made on September

27, 1976 (A. 441) adverse to appellants. Appellants have served and filed a notice of appeal (A. 443) to this Court requesting a review of the order and decision of December 8, 1975, the judgment of February 26, 1976 and the judgment of September 27, 1976.

Questions Presented for Review

1. (a) Whether a bona fide Title VII issue was presented by respondent, or rather, did the Court below act in violation of the New York State Civil Service Law?

The Court below answered, as to the first part, in the positive, and as to the second part, in the negative.

1. (b) Whether the Court below, by its decision which reinstated appellee as a medical technologist I, thereby created impermissible reverse discrimination at NCMC?

The Court below did not address itself to this question.

2. Whether, pursuant to Title VII, appellee proved a prima facie case of race discrimination?

The Court below answered in the affirmative.

3. Whether appellants met their burden of persuasion by proving that the qualifications for employment disputed herein are job-related?

The Court below answered in the negative.

4. Whether appellee is entitled to an award of back pay?

The Court below answered in the affirmative.

5. Whether the attorney for appellee is entitled to an award of attorney's fees?

The Court below answered in the affirmative.

POINT I

Appellee Has Failed to Present a Substantial Federal Question; Her Claim Should, Therefore, Be Dismissed.

It is appellants' contention that under all the facts and circumstances in the case at bar, appellee has failed to raise a cognizable claim within the ambit of Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.;* hereinafter "Title VII"). Appellants also contend that the Court below was clearly erroneous in its analysis of the applicability of Title VII to the facts of this case, and that its intrusion into a situation that presented itself as nothing more than the internal administration of a local civil service matter is an abuse of discretion that warrants reversal. Furthermore, the Court below by its decision in this case, has created reverse discrimination within the Nassau County Civil Service system at NCMC.

(a) The application and analysis of Title VII to the case at bar by the Court below is clearly erroneous.

In its memorandum decision, the Court below applied Title VII analysis in its attempt to show that race discrimination against appellee exists at NCMC. The Court below found that appellee proved a prima facie case of race discrimination pursuant to Title VII through her introduction of statistics showing educational disparity at the college degree level between whites and blacks. It stated as follows: "These statistics establish a prima facie case that a degree requirement has a disproportionate impact on blacks." (A. 299; Memorandum, p. 11). These general statistics showing educational disparity were the only proof of any race discrimination submitted by appellee. Appellee did not, for example, show whether or

not blacks were under-represented in medical technologist positions at NCMC nor did appellee make any showing as to whether or not she was individually discriminated against due to her race.

The Court below used the statistics introduced by appellee as a vehicle to create a special position at NCMC for this appellee. This can be discerned by the conclusion reached by the Court below, because while it found that the college degree requirement has a "discriminatory impact" on blacks, the Court below did not declare the job requirement at issue to be invalid or discriminatory as against any black person *except for this appellee.* (A. 304; Memorandum, p. 16). If "discriminatory impact", or "adverse racial effect" has any application at all, once such impact is found it must apply to all members of the adversely affected minority and not only to one of those members to the exclusion of all others. The Court below was clearly erroneous in its memorandum decision in finding, on the one hand, that the educational requirement at issue has a "discriminatory impact" on blacks, yet on the other hand holding that the degree requirement is valid as to any black person seeking to be a medical technologist at NCMC except this appellee. (*Griggs* v. *Duke Power Co.*, 401 U.S. 424, 28 L.Ed.2d 158, 91 S.Ct. 849 (1971); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973).

The Court below was able to achieve this anomalous result by reliance upon a due process case decided by the Washington, D.C. Circuit Court of Appeals.[1] In declaring

---

[1] *Berger* v. *Board of Psychologist Examiners*, 521 F.2d 1056 (1975). *Berger* is clearly inapplicable to a Title VII case. In *Berger*, plaintiff sought to have a local Washington, D.C. licensing statute declared unconstitutional as against the Due Process Clause of the Fifth Amendment. The D.C. Circuit Court of Appeals

the educational requirement at issue to be invalid only as to *this appellee*, it is evident beyond cavil that the basis for this erroneous conclusion by the Court below is appellee's satisfactory performance of her job in the blood bank laboratory and not because of any job requirement that simultaneously has a discriminatory effect upon blacks, yet is not discriminatory against blacks.

It is respectfully submitted that doing a good job as a provisional employee within a municipal civil service system is not a ground for relief within the purview of Title VII, or any federal statute. Furthermore, if the educational requirement has a "discriminatory racial impact," then it must necessarily have an adverse discriminatory impact upon all blacks and not solely upon the appellee who, it is conceded, does a good job in the blood bank laboratory.

(b) Under all the facts and circumstances of this case, the Civil Service Law of the State of New York is the only applicable law and the Court below abused its discretion and improperly applied Title VII to this case.

Reliance upon *Berger* v. *Board of Psychologist Examiners, supra*, that the educational requirement for medical

---

found this statute to be unconstitutional because, *inter alia*, it denied current practitioners of psychology "grandfather rights" (i.e., permission to take the licensing examination) and because the Court found psychology to be an inexact science and a graduate degree, therefore, does not necessary demonstrate competence. In the case at bar, ostensibly a Title VII case, the Nassau County Board of Supervisors passed a resolution (Resolution No. 1063-1968) which specifically accorded grandfather rights to appellee and all other civil service employees similarly situated (A. 424). Furthermore, medical technology is an exact science and a bachelor of science degree is surely indicative of competence in this field. See Point III of brief herein. Finally, appellee has no Due Process right to be reinstated as a provisional medical technologist I. See Point I(b) of Brief.

technologist I, which the Court below simultaneously found to be discriminatory against blacks yet discriminatory and invalid only as to the appellee, demonstrates beyond question that its decision was based upon appellee's performance in the blood bank laboratory and not upon any employment practice of appellants that has a discriminatory effect upon blacks. The facts and circumstances of this case do not justify this inconsistency nor warrant intrusion by the federal courts pursuant to Title VII. Further abuse of the Court's discretion was committed by unwarranted encroachment upon local sovereignty when it ordered that appellee be reinstated as a medical technologist I. *National League of Cities* v. *Usery*, —— U.S. ——, 49 L.Ed.2d 245 (1976); *Bishop* v. *Wood*, —— U.S. ——, 48 L.Ed.2d 684, 693 (1976).

Appellee, by reason of her provisional status, has no cognizable federal right to be retained as a medical technologist I. The fact that she has or has not been performing her job creditably is of no consequence and proffers no federal right to relief upon appellee. *Russell* v. *Hodges*, 470 F.2d 212 (2d Cir. 1972); *Gallagher* v. *Codd*, 407 F.Supp. 956 (S.D.N.Y. 1976); *Haroon* v. *Board of Education of City of New York*, 411 F.Supp. 61 (E.D.N.Y. 1976).

New York law gives the power to determine qualifications of applicants for promotional examination to the local Civil Service Commissions. Civil Service Law § 20, subd. 1 and § 52, subd. 2 (McKinney's Consol. Law of New York Anno.); *Matter of Wirzberger* v. *Watson*, 305 N.Y. 507 (1953). It is equally clear under New York law that a provisional employee, such as appellee, has no vested rights or tenure in her position. *Koso* v. *Greene*, 260 N.Y. 491 (1933). No facts were presented by appellee that would

be sufficient to remove the instant proceeding from the application of the foregoing principles of New York law.[2]

It is respectfully submitted that this Court follow the general principle enunciated by it in *Kirkland* v. *New York State Department of Correctional Services,* 520 F.2d 420, 429 (2d Cir. 1975):

> "It seems to us that the judiciary should act with great reluctance in undermining traditional civil service concepts; and, if a decision is to be made to subordinate the social purposes of civil service to those of equal employment opportunity, that decision should be made by the people speaking through their legislators."

While it is clear that federal courts are empowered to examine and pierce state laws in the framework of federal civil rights enactments the case at bar does not present such a factual situation that justifies or warrants such a confrontation. It is respectfully submitted that the Court should defer to the classificaion for medical technologist I established by appellant Civil Service Commission.

(c) The decision of the Court below has created a situation where reverse discrimination now exists at Nassau County Medical Center.

By its strained and erroneous interpretation in applying Title VII to the case at bar, the Court below has,

---

[2] The original impression of the Court below, i.e. that this case presented only a "bureaucratic" problem, is the correct impression of the base at bar. The Court below noted:

> "But, my problem is not whether individuals are crushed by the machine or bureaucracy, because that happens all the time. That is not what the court is here for, to rectify every injustice. There must be an injustice as to whites as well as blacks in that hospital. My problem is whether you have made out a case based on race." (A. 182).

See as well the dialogue between the Court below and Mr. Allen Scimeca, at A. 154-155.

in effect, created reverse discrimination within Nassau County Medical Center. In *Milson* v. *Leonard,* —— F. Supp. ——, E.D.N.Y. Docket No. 74 C 904 (1975, Dooling, *J.*), plaintiff, a white female, brought suit against the Nassau County Civil Service Commission (hereinafter "Commission"), to be reinstated, provisionally, as a medical technologist III at NCMC and to be accorded an opportunity to take the April 1973 examination for permanent status in that position. (Slip. Op., at pps. 1-2). The Commission excluded plaintiff from the April 1973 examination on the ground that she lacked the educational requirements for the position (Slip. Op., at p. 3). The Court, in *Milson, id,* dismissed plaintiff's complaint pursuant to Fed.R.Civ. P. 56, finding that plaintiff did not and could not present a claim for relief that is cognizable by a federal court. The Court, in *Milson, id,* also noted that "questions of jurisdiction are troublesome." (Slip. Op., at p. 5).

The decision of the Court below left NCMC and the Commission in a position where a white woman who, like appellee, was a provisional employee and who, like appellee, was performing competently in her provisional position, yet who, unlike appellee, has no right to be reinstated in her provisional position with full back pay. The decision of the Court below constitutes nothing more than reverse discrimination and should be reversed. *McDonald* v. *Santa Fe Trail Transportation Co.,* —— US ——, 49 L.Ed.2d 493 (1976); *Kirkland* v. *New York State Board of Correctional Services, supra.* This is especially true in the case at bar where the effect of the decision of the Court below will not be diffused among an unidentifiable group of persons, but will and does affect a small number of readily identifiable persons. *Equal Employment Opportunity Commission* v. *Local 638,* 532 F.2d 821, 828 (2d Cir. 1976).

POINT II

The Court Below Clearly Erred in Finding, Upon Remand, That Appellee Proved a Prima Facie Case of Race Discrimination.[3]

The only evidence of any race discrimination introduced by appellee at trial were statistics showing educational disparity between blacks and whites at the college degree level. (A. 298; A. 360-A. 370). It should be noted at the outset that appellee never attempted to show that blacks were underrepresented as medical technologists at NCMC nor that any actions on the part of the supervisors at NCMC discriminated against her on the basis of race.

Appellee brought the present lawsuit as an individual, provisional employee in a municipal civil service system, seeking to be reinstrated in her original, provisional position. It is submitted that general statistics showing educational disparity between the races are insufficient under the circumstances of the present case to establish a prima facie case of race discrimination. The Court below committed reversible error when it permitted relief pursuant to Title VII to this individual appellee, specifically excluding all blacks except appellee from its decision (A. 304-305), where the only showing of race discrimination made by appellee consisted of general, educational disparity statistics.

The Fifth Circuit cases[4] relied upon by the Court below were class actions involving large groups of employees

---

[3] If this Court finds that federal intrusion is not warranted in the case at bar, it need not go beyond Point I of this Brief. For purposes of this Point and the following points of law in this Brief, it will be assumed, *arguendo*, that appellee has a claim which may fall within the ambit of Title VII.

[4] *United States* v. *Georgia Power Co.*, 474 F.2d 906, (5th Cir. 1973); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1361 (5th Cir. 1974).

who were frozen out of the more desirable management-level positions due to the diploma requirements of their private employer, as well as testing which had a disproportionate impact on minority employees. Additionally, plaintiffs therein submitted far more evidence than mere statistics showing educational disparity in proving their claims based upon race discrimination. (e.g., The class plaintiffs showed, through statistical data, that they were overrepresented in labor positions, and underrepresented in managerial positions at their place of employ.) It is evident that the Court below was unimpressed with appellee's lack of proof, both at trial[5] (A. 180, A. 182, A. 188-189, A. 283), and in its memorandum decision insofar as the Court below did not invalidate the degree requirement except as to the appellee, and only then on the clearly erroneous grounds that appellee could be likened to the plaintiff in *Berger* v. *Board of Psychology Examiners*, *supra*. (See Point 1(a) of Brief).

Where statistics tending to show adverse impact are the sole basis for a prima facie case of race discrimination

---

[5] Once again the original impressions of this case, made by the Court below, are the correct impressions. The Court below noted:

> "You may have it, but insofar as I can tell here, it may well be discrimination runs the other way. I just don't know. I just say they can't on the basis of your statistical data, draw any conclusions." (A. 180).
>
> "My problem is whether you have made out a case based on race. Now, I do not see it, that you have based it upon these particulars, it's just too thin. (A. 182).
>
> "But we have a situation here where there isn't the slightest evidence of racial discrimination and intentionally. (sic)
>
> Counsel have all agreed on that from the outset.
>
> There was no history of racial discrimination in this department or in the hospital.
>
> It is quite unlike the Griggs case in that respect.
>
> The Griggs case had a long history of racial discrimination." (A. 283).

pursuant to Title VII, the adverse impact necessarily affects all members of the adversely affected minority who seek the same position (here, medical technologist) and not only one of those members (here appellee) based upon her provisional status in the position. *See,* e.g., *Griggs* v. *Duke Power Co., supra,* 401 US at 430-431; *Robinson* v. *Lorillard Corporation,* 444 F.2d 791, 798 (4th Cir. 1971), *cert. den.* 404 US 1006.

The decision of the Court below, finding on the one hand that appellants' job qualifications have a disproportionate impact on blacks, and on the other hand that all blacks who wish to be medical technologists at NCMC must comply with the job qualifications, *except for appellee,* constitutes a clearly erroneous construction of the "prima facie case" rule and should be reversed.

It is submitted that the better rule to be applied in the case *sub judice* is the rule enunciated by this Court in *Gresham* v. *Chambers,* 501 F.2d 687 at 691-692 (2d Cir. 1974):

> "Only upon a showing of unlawful discrimination will formal open recruiting or some other recruiting method be mandated in lieu of word-of-mouth recruiting. Where a pattern of past discrimination appears, recruitment procedures that might otherwise be classified as neutral will no longer be accepted as non-discriminatory. Additional methods must then be devised to compensate for the effects of past discriminatory practices and to guard against their perpetuation or recurrence. (Citations omitted.) However, absent such a showing, word-of-mouth recruiting will not be barred.
>
> In the present case appellant has failed to prove that a pattern of discrimination against blacks existed at the College. On the contrary the evidence established,

and Judge Dooling found, an absence of any such discrimination, purposeful or otherwise."

See, as well, *United States* v. *International Union of Elevator Constructors,* 538 F.2d 1012, 1014-1015 (3rd Cir. 1976). At the very least, a showing of under-representation should be made in order to prove a prima facie case, especially where, as here, the only evidence of race discrimination are statistics which show that more whites than blacks have college degrees.

It is evident that the Court below found no discrimination at NCMC, "purposeful or otherwise", both during the trial (see fn. 5 of Brief) and subsequently in rendering its decision, wherein the Court below found the disputed job qualifications valid as to every black person except for the appellee. (A. 304-305; Memorandum, pp. 16-17). It is respectfully submitted that a finding of "adverse racial impact" without a finding of any actual discriminatory practice at NCMC is superfluous, clearly erroneous, and warrants reversal. Furthermore, "adverse racial impact", if it operates at all, operates to discriminate individiously against all blacks, and not only against a single black person in an isolated instance. *See,* e.g., *Equal Employment Opportunity Commission* v. *Local 638, et al., supra,* fn. 4 at page 825 (2nd Cir. 1976); *Parham* v. *Southwestern Bell Telephone Co.,* 433 F.2d 421, 427-428 (8th Cir. 1970); *Harper* v. *Trans World Airlines, Inc.,* 525 F.2d 409 (8th Cir. 1975); *Kaplan* v. *Int'l Alliance of Theatrical and Stage Emp. and Motion Picture Mach. Operators of U.S. and Canada,* 525 F.2d 1354, at 1358, 1360 (9th Cir. 1975).

The Tenth Circuit follows the rule that, in order to establish a prima facie case of race discrimination, statistical data proferred by the plaintiff should be closely related to the specific issues presented. *Rich* v. *Martin Marietta*

Corp., 522 F.2d 333, 346 (1975); *Taylor* v. *Safeway Stores, Inc.*, 524 F.2d 263, 272 (1975); *Olson* v. *Philco Ford*, 531 F.2d 474 (1976). This rule should be followed in the case at bar, where the statistics introduced by appellee failed to show any discrimination against this appellee, purposeful or otherwise. Cf. *Jones* v. *New York City Human Resources Admin.*, 528 F.2d 696, 698 (2d Cir. 1976), where the statistical data was closely related to the specific issues at bar. The Court below clearly erred in affording relief to a single member of a minority based ostensibly upon a showing of "adverse impact", which by its own terms necessarily includes all minority members. Its decision, therefore, should be reversed.

POINT III

The Court Below, on Remand, Wholly Failed to Consider Its Original Decision in Light of *Washington* v. *Davis*,[6] and Is Clearly Erroneous in Its Application of Job-Relatedness in the Case at Bar.

In *Washington* v. *Davis*, *id*, decided subsequent to the memorandum decision of the Court below and prior to the first oral argument before this Court (Index no. 76-7003), the United States Supreme Court approved an examination which admittedly had an adverse impact upon blacks. The examination at issue in *Washington* v. *Davis* was never validated by the employer vis-a-vis performance on the ultimate job. The only validation of the examination in that case was based upon performance in training school (i.e. the police academy). 48 L Ed 2d, at 613. The Court stated in pertinent part:

> "Based on the evidence before him, the District Judge concluded that Test 21 was directly related to the

[6] —— US ——, 48 LEd 2d 597 (1976).

> requirements of the police training program and that a positive relationship between the test and training course performance was sufficient to validate the former, wholly aside from its possible relationship to actual performance as a police officer." 48 L Ed 2d at 613.

The Washington, D.C. Circuit Court of Appeals found that actual job performance validation is required of a discriminatory examination and that training performance is an insufficient basis upon which job relatedness may be shown by the employer (512 F 2d 956, at 963-964). The Court below utilized the same actual job performance based analysis as di he D.C. Circuit Court of Appeals in *Washington* v. *Davis,* and failed to consider the employment system utilized as a whole at NCMC by the Commission. Strict, actual job performance analysis is no longer the law, at least with respect to municipal and other governmental employers. In determining whether a job requirement, be it an examination or academic degree prerequisite, is substantially job related, courts may no longer base their decisions solely and strictly upon actual performance in the ultimate job. 48 L Ed.2d, at 613-614.

There are several ways in which a job requirement may be validated, one of which is

> ". . . perhaps by ascertaining the minimum skill, ability or potential necessary for the position at issue and determining whether the qualifying tests are appropriate for the selection of qualified applicants for the job in question." 48 L Ed 2d, at 611-612.

Under the new standards enunciated in *Washington* v. *Davis,* federal courts should no longer view a disputed job

requirement in isolation, but should consider the job requirement as part of an entire employment system. Employers may test candidates for potential and may establish qualifications for employment which are appropriate in the selection of qualified applicants for the job in question.

The Court below, in its original decision, recognized that the degree requirement might guarantee qualified new applicants for the position of medical technologist at NCMC. It stated in pertinent part:

> "Although no direct evidence was presented on this point, a degree or its equivalent might guarantee that *new applicants* possess the skills and learning needed for successful training in the blood bank." (A. 305; Memorandum p. 17)

On remand, the Court below failed entirely to discuss this salient point, which was at or near the heart of the vacatur itself. (A. 433-440). The Court below failed to hold a hearing to determine whether or not the degree requirement or A.S.C.P. certification is an adequate means for insuring qualified new trainees for medical technologist positions at NCMC. This constituted a failure by the Court below to comply with the order of vacatur and remand of this Court.

It is appellants' contention that the evidence submitted below showed that, for the highly technical and responsible position of medical technologist, the requirement of a college degree is clearly appropriate for the selection of qualified applicants. The Court below stated, as is here pertinent:

> "The court does not rule on the validity of the degree requirement except in the special circumstances of the case before it. Mr. Appelwaithe, the supervisor, did suggest that a college degree might be useful. In addi-

> tion, Ms. Schwaid testified that her undergraduate education was helpful in enabling her to read the literature in the field." (A. 304-305; Memorandum, pp. 16-17).

Both Mr. Appelwaithe and Ms. Schwaid were witnesses for appellee.

Furthermore, the Court below, both in its memorandum decision and perfunctorily in its reaffirmance order after remand, ignored the evidence submitted by appellants which showed that the degree requirement for medical technologist was appropriate for selecting new applicants as well as for demonstrating capacity for actual job performance as a medical technologist. In order to show that the requirement of a bachelor of science degree or ASCP certification for the position of medical technologist I is job-related, vis-a-vis both actual job performance as well as the selection of new candidates for medical technologist, appellants relied, for the most part, upon a reclassification scheme for the entire civil service of Nassau County prepared for appellants by the firm of Cresap, McCormick & Paget (Defendant's Exhibit "A", A. 372 *et seq.*). In order to arrive at the qualifications for what was to become the position of medical technologist I, those conducting the survey relied upon questionnaires which were given to employees in all departments of NCMC (A. 197-198), including at least three employees in the blood bank laboratory (A. 220, 237). Recommendations were also sought from each and every supervisor and department head (A. 199-200, 220). In addition, research was done as to similar positions in other jurisdictions, so that a point of reference could be established and those conducting the survey would not be forced to rely solely upon the subjective viewpoints of department heads, supervisors and employees (A. 200, 221, 251-252). For example, the United

States Department of Labor, New York City and New York State require a bachelor of science degree or ASCP certification from their candidates for medical technologist positions. (A. 251-256). See Defendant's Exhibits "B", "C" and "D". Finally, in arriving at the job qualifications for the position of medical technologist I, those who conducted the survey based the qualifications upon duties which could be performed in all the laboratories in appellant hospital, and not merely for assignment to the blood bank laboratory (A. 222). It is submitted that the Court below was clearly erroneous in both its memorandum decision of December 8, 1975 and its judgment of reaffirmance of that decision following remand (A. 441), in that the Court failed to fairly weigh and consider the above evidence submitted by appellants, which undoubtedly showed the degree requirement at issue to be substantially job related within the ambit of the principles enunciated in *Washington* v. *Davis*.

Even assuming, *arguendo*, that actual performance in the ultimate job is the sole basis for analysis of job relatedness, the Court below erred in its criterion and content validation analysis in that its analysis was limited to performance in the blood bank (A. 302-303). The job specification for medical technologist I calls for knowledge and skill in all of the various laboratories contained in NCMC (A. 148, 222); any validation analysis, even if such analysis is limited to actual performance on the job, should be based upon the job specification as a whole and not upon only one aspect of the job specification. Should appellee be accorded the position of medical technologist I, she could be freely transferable to any laboratory in NCMC on a purely administrative basis. Furthermore, new applicants for the position of medical technologist, regardless of race, must be prepared for assignment in any one of several different laboratories at NCMC (A. 148, 222).

The Court below, as well, clearly erred in utilizing only the criterion or predictive validation method in determining that the degree requirement is not job related. It stated in its memorandum decision: "Moreover, under the Guidelines, content and construct validation may be used only upon a showing that criterion validation is not feasible. 29 C.F.R. Sec. 1607.5(a) (1974); *see also,* The Supreme Court, 1974 Term 89 Harv.L.Rev. 47, 233 (1975)." (A. 303)

It should be noted, first, that the Cresap, McCormick & Paget study which created the position of medical technologist as well as the degree requirement, could not possibly utilize any criterion validation methods in determining the efficacy of a Bachelor of Science degree because there were no medical technologists at that time. At the time the degree requirement came into being, there were no medical technologists in any of the laboratories at Nassau County Medical Center. Furthermore, there are an insufficient number of medical technologists who work in the blood bank against whose job performance the degree requirement may be measured.[7] *See Jackson et al* v. *Nassau County Civil Service Commission, et al,* —— F.Supp. ——, Docket No. 74-C-407, E.D.N.Y., Oct. 13, 1976 (Mishler, Ch.J.) slip. op. at p. 12. Finally, it is clear beyond any doubt that "there is no longer any single method for appropriately validating employment tests for their relationship to job performance." *Washington* v. *Davis, id,* 48 L. Ed. 2d at 612, fn. 13; *Jackson* v. *Nassau County Civil Service Commission,* id, slip. op. at p. 11. The error committed by the Court below in its analysis of job relatedness, especially in light of its confirmation of its original decision following remand by this Court, is clear and fundamental.

---

[7] Only three or four persons who hold the medical technologist title work in the blood bank laboratory (A. 133, 144).

The position of medical technologist in a hospital involves specialized skills and is considered to be a "professional" position (A. 350; 407-422). The corresponding human risk factor for such a position is relatively high. For example, a mistake by a medical technician who is working in the blood bank laboratory can be the cause of a patient disease or fatality (A. 58). Where a hospital job, such as medical technologist, involves a high human risk factor, the Equal Employment Opportunity Commission has determined that an employer's burden to prove that its qualification is job related is significantly less than where the job involves little or no human risk. 29 C.F.R. 1607.5(c)(2)(iii) states as follows:

> "(iii) The smaller the economic and human risks involved in hiring an unqualified applicant relative to the risks entailed in rejecting a qualified applicant, the greater the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when the former risks are relatively high."

The Tenth Circuit, in *Spurlock* v. *United Airlines, Inc.*, 475 F.2d 216 (1972) has explained the employer's burden of persuasion of job-relatedness in cases such as the present as follows:

> "When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, the courts should examine closely any pre-employment standard or criteria which discriminate against minorities. In such a case, the employer should have a heavy burden to demonstrate to the court's satisfaction that his employment criteria are job-related. On the other hand, when the job clearly requires a high degree of skill and the economic

> and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related." 475 F.2d at 219.

See as well, *Hodgson* v. *Greyhound Lines, Inc.*, 499 F.2d 859, 862 (7th Cir. 1974). Considering the skill, talent and human risk factors involved in the hospital position of medical technologist, the mode utilized by appellant Commission in determining the necessary qualifications for that position was clearly sufficient to meet its burden of showing job-relatedness. The method of criterion related validation should not be woodenly applied in the case at bar where high risks in life and death hospital situations are a daily routine (A. 302-303).

The Court below refused to consider, in weighing the job-relatedness aspect of this case, the public policy of New York State which mandates that municipal employers, such as appellants, base the positions within their employment systems upon competition and public merit. New York Constitution Article V, section 6; New York Civil Service Law, section 20 (McKinney's Consol. Laws of N.Y. Anno.). Appellants must operate within the bounds of a statutory public merit system which distinguishes them from private employers who are not under the restraint of any similar social policy. *Cf. Kirkland* v. *New York State Department of Correctional Services.* The Court below failed to consider the effect of New York statutory law upon appellants when the position of medical technologist at NCMC was created, along with its corresponding degree or certification requirement.

It is, therefore, respectfully submitted that the Commission did all that was reasonably and rationally required, within the purview of *Washington* v. *Davis*, to

insure job-relatedness to the degree or ASCP certification requirement for medical technologists at NCMC. The decision of the Court below as to job-relatedness, especially in view of the remand by this Court, is clearly erroneous and should be reversed.

POINT IV

The Court Below Abused Its Discretion in Awarding Back Pay to Respondent.

42 U.S.C. 2000e-5(g) provides in pertinent part as follows:

> "(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice) or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable."

The policy underlying an award of back pay in a Title VII action has been stated as follows by the Supreme Court in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975), as follows:

"The District Court's decision must therefore be measured against the purposes which inform Title VII. As the Court observed in Griggs v. Duke Power Co., supra, 401 U.S., at 429-430, 28 L. Ed. 2d 158, 91 S. Ct. 849, the primary objective was a prophylactic one:

'It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.'

"Backpay has an obvious connection with this purpose. If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history'." United States v. N.L. Industries, 479 F.2d 354, 379. 45 L. Ed.2d, at 296-297.

The Court in *Albemarle Paper Co.* v. *Moody, supra,* further stated in this regard:

"As this makes clear, Congress' purpose in vesting a variety of 'discretionary' powers in the courts was not to limit appellate review of trial courts, or to invite inconsistency and caprice, but rather to make possible the 'fashion[ing] [of] the most complete relief possible.'

"It follows that, given a finding of unlawful discrimination, *backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination*

> *throughout the economy* and making persons whole for injuries suffered through past discrimination. The courts of appeals must maintain a consistent and principled application of the backpay provision, consonant with the twin statutory objectives, while at the same time recognizing that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases." 45 L. Ed.2d, at 298-299. (emphasis added)

In the case at bar, there is no pattern of discrimination present in appellant hospital, nor was there a finding of any prior discriminatory employment practices on the part of appellants herein (Points I & II, infra A. 283). Furthermore, in view of the limited holding of the Court below (Point V, infra, A. 304), Congressional policy underlying Title VII as enunciated in *Albemarle Paper Co.* v. *Moody,* infra, would not be frustrated by the denial of an award of back pay to respondent herein.

In addition to a finding of discrimination, the Court should not make an award of back pay unless it finds that, had respondent been a white person instead of a black person, she would have retained the position of medical technologist I. *Day* v. *Matthews,* 530 F.2d 1083 (D.C. Cir., 1976); *Acha* v. *Beame,* 531 F.2d 648, 656 (2d Cir. 1976). If it is found that appellee would not have been selected as a medical technologist I regardless of her color, she would not be entitled to an award of back pay. *Day* v. *Matthews, id.,* at pg. 1085. The crucial question which must be answered, and which wasn't answered by the Court below, is: Would appellee have been retained as a medical technologist I *but for* the fact that she is black? In the case at bar, it is clear that appellee would not have been appointed as a medical technologist I even if she were a white person (A. 34).

In view of the foregoing, it is respectfully submitted that the award of back pay to appellee was an abuse of discretion and should be reversed.

POINT V

The Court Below Abused Its Discretion in Awarding Attorney's Fees to Appellee.

While Congress has permitted courts in Title VII cases to award attorney's fees to successful plaintiffs, 42 U.S.C. 2000e-5(k), the discretion accorded courts is not unbounded. The District Court should be guided by the "private attorney general" doctrine, as enunciated in *Newman* v. *Piggy Park Enterprises*, 390 U.S. 400, 19 L.Ed.2d 1263, 88 S.Ct. 964 (1968), in determining whether or not to award attorney's fees to a Title VII plaintiff. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 45 L.Ed.2d 280 at 295, 95 S.Ct. 2362 (1975); *Fowler* v. *Schwarzwalder*, 409 F.2d 143 (8th Cir. 1973).

Generally, Title VII plaintiffs who obtain an injunction against the employer will be awarded attorney's fees. This is because there is a strong public interest in having injunctive actions brought under Title VII, to eradicate discriminatory employment practices. *Albemarle Paper Co.* v. *Moody*, *supra*, 45 L.Ed.2d at 295.

Appellee herein does not fall within the "private attorney general" doctrine for the following reasons: First, appellee failed to obtain a preliminary injunction. Second, the ruling by the court below was limited to appellee. The Court below stated as follows:

> "The Court does not rule on the validity of the degree requirement except in the special circumstances of the case before it." (A. 304).

Third, there was no finding of racial discrimination by the Court below (A. 283), so that there are no discriminatory practices on the part of appellants which were or could be enjoined.

In light of the foregoing, it is respectfully submitted that appellee does not fall within the purview of the "private attorney general" doctrine as enunciated in *Newman* v. *Piggy Park Enterprises, supra,* and reaffirmed in *Albemarle Paper Co.* v. *Moody, supra.* Therefore, the Court below abused its discretion in awarding attorney's fees to appellee.

CONCLUSION

For the reasons stated above, the order and judgment appealed from should be reversed.

Respectfully submitted,

James M. Catterson, Jr.
County Attorney of Nassau County
Attorney for
Nassau County Defendants-Appellants
Nassau County Executive Building
Mineola, New York 11501
(516) 535-4406

Natale C. Tedone
Senior Deputy County Attorney

William S. Norden
Deputy County Attorney
Of Counsel

Matthew Tedone
Law Clerk
On the Brief

Lex Printing Co., Inc., 451 Greenwich St., N.Y. 10013—966-4300